

1 IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
2 STATE OF NEW MEXICO, ex rel., NEW MEXICO
3 JUDICIAL STANDARDS COMMISSION,

4 Petitioner,

5 vs.

6 HON. GERALDINE E. RIVERA, Second Judicial
7 District Court Judge,

8 Respondent,

9 and

10 RANDY M. CHAVEZ,

11 Real Party in Interest.

12 ORIGINAL PROCEEDING

13 Patricia A. Madrid, Attorney General
14 David K. Thomson, Assistant Attorney General
15 Santa Fe, NM

16 for Petitioner

17 Patricia A. Madrid, Attorney General
18 Arthur W. Pepin, Assistant Attorney General

19 for Respondent

20 Sanchez, Mowrer & Desiderio, P.C.
21 Robert J. Desiderio
22 Albuquerque, NM

23 for Real Party in Interest

SUPREME COURT OF NEW MEXICO

FILED

NOV 14 2005

William G. Thomson

NO. 29,239

RECEIVED

NOV 15 2005

NM JUDICIAL
STANDARDS COMMISSION

W. G. Thomson

1 **DECISION**

2 **CHÁVEZ, Justice.**

3 {1} Under its unusual procedures for obtaining a subpoena, the Judicial Standards
4 Commission ("Commission"), upon a concurrence of the majority of the Commissioners,
5 authorized the Executive Director to file a petition in District Court seeking a limited
6 subpoena of a witness. The subpoena commanded the witness, an attorney for the judge in
7 question, to appear for a deposition. The limitation expressly stated on the face of the
8 subpoena was as follows:

9 The New Mexico Judicial Standards Commission will be
10 seeking information from you regarding conversations you had
11 with third parties (i.e. individuals who do not have an attorney-
12 client relationship with you) with respect to a judge's
13 involuntary commitment at a medical facility. The Commission
14 is not seeking from you any information that is protected by an
15 attorney-client relationship and/or the attorney-client privilege.

16 On April 19, 2005, the Commission petitioned the District Court to issue the confidential
17 subpoena and to seal the court file, and the District Court granted the petition on April 19,
18 2005. In response, the witness filed an emergency motion to quash the subpoena in District
19 Court, asserting two grounds in support of the motion. One, the subpoena sought
20 information protected by the attorney work product doctrine. Two, although the witness was
21 not expected to represent the judge before the Commission, he should be treated as opposing
22 counsel, and courts generally disfavor deposing counsel because testimony from counsel is
23 generally protected by the attorney-client privilege. On April 26, 2005, the District Court

1 entered an order scheduling an evidentiary hearing for May 23, 2005, and held the subpoena
2 in abeyance until that hearing was to take place. On May 20, 2005, the Commission
3 petitioned this Court for either a writ of prohibition or a writ of superintending control to
4 prohibit the District Court from entering a final order quashing the subpoena and conducting
5 the evidentiary hearing. We entered an order staying the proceedings and heard oral
6 argument on August 17, 2005. We now reverse the District Court and enter a permanent
7 order staying the proceedings. We also remand this matter to the Commission for
8 proceedings consistent with this decision.

9 WRIT OF PROHIBITION

10 {2} The Commission seeks a writ of prohibition or a writ of superintending control.
11 Article VI, Section 3 of the New Mexico Constitution grants this Court the power to issue
12 both. Here, we employ the writ of prohibition, which we have defined as:

13 an extraordinary writ, issued by a superior court to an inferior
14 court to prevent the latter from exceeding its jurisdiction, either
15 by prohibiting it from assuming jurisdiction in a matter over
16 which it has no control, or from going beyond its legitimate
17 powers in a matter of which it has jurisdiction.

18 *State ex rel. Harvey v. Medler*, 19 N.M. 252, 258, 142 P. 376, 378 (1914). Although we
19 appreciate the work of the District Court in this case, we find that it has no authority to
20 quash Commission-requested subpoenas or to hold related evidentiary hearings. Therefore,
21 we issue a writ of prohibition and order a permanent stay to end the District Court's

1 involvement in this case. Further proceedings will take place in the Commission and, if
2 necessary, in this Court.

3 **DISCUSSION**

4 {3} Article VI, Section 32 of the New Mexico Constitution was amended in 1967 to
5 create the Commission. This section endows the Commission with the power to investigate
6 and make recommendations to this Court regarding the discipline, removal, or retirement of
7 a judge for, *inter alia*, willful misconduct or inability to perform a judge's duties. N.M.
8 Const. art. VI, § 32. All papers filed with the Commission and proceedings before the
9 Commission are confidential. *Id.* The Constitution also empowers the Commission to
10 establish its own procedures for hearings. *Id.* The role, function and powers of the
11 Commission are reiterated in NMSA 1978, §§ 34-10-1 to 34-10-4 (1968), although the
12 source of the Commission's powers remains the Constitution itself.

13 {4} The Commission was designed to be the "watchdog of the judiciary," and "[i]n order
14 to achieve an efficient and well disciplined judicial system possessing the highest degree of
15 integrity, it [was] felt that an *independent* commission [was] necessary to oversee and
16 investigate performance, conduct and fitness of members of the judiciary." *State Judicial*
17 *Standards Commission v. Espinosa*, 2003-NMSC-017, ¶¶ 10-11, 134 N.M. 59, 73 P.3d 197
18 (quoting 1967 Report of the Constitutional Revision Commission at 88) (quotations
19 removed and emphasis added). Pursuant to its constitutional authority, the Commission has
20 promulgated its own procedural rules and has not adopted the Rules of Civil Procedure for
21 the District Courts of New Mexico. *See New Mexico Judicial Standards Commission Rules*

1 NMRA 2005 (hereafter “Commission Rules”); *cf.* Rule 17-301(B) NMRA 2005 (applying
2 the Rules of Civil Procedure for the District Courts of New Mexico to attorney disciplinary
3 proceedings). Notably, the Constitution does not grant state district courts jurisdiction over
4 any type of judicial disciplinary matters. Therefore, any jurisdiction that district courts may
5 have must come from the Commission itself.

6 {5} Commission Rule 4(B) NMRA 2005 articulates the Commission’s subpoena power
7 and provides that a majority of the Commissioners can “petition a district court to subpoena
8 witnesses..., compel their attendance and examine them under oath or affirmation,
9 and...require the production of documents, books, accounts, and other records, and...other
10 discovery.” In adopting this rule, it appears that the Commission was influenced by the
11 legislative description of its subpoena power in NMSA 1978, Section 34-10-2(B) (1977),
12 where the Legislature directed the Commission to petition a district court in order to obtain
13 a subpoena. However, the Commission’s power to promulgate rules is independent of any
14 legislative power, and the Commission has not authorized district courts to quash
15 Commission-requested subpoenas or to conduct evidentiary hearings regarding them. We
16 note that nothing would prevent the Commission from rewriting its rules to eliminate district
17 courts from the subpoena process, similar to how the Disciplinary Board subpoenas
18 witnesses, *see* Rules 17-306(A)(3) & (B) NMRA 2005, or to permit an attorney for the
19 Commission to obtain a subpoena consistent with Rule 1-045(A)(3) NMRA 2005, which
20 allows an attorney licenced to practice law in New Mexico and who represents a party to
21 issue a subpoena as an officer of the court.

22 {6} While the Commission Rules do not establish a procedure for quashing confidential

1 subpoenas or holding related evidentiary hearings in district court, they outline the
2 procedures for a witness to challenge a Commission subpoena. Commission Rule 18
3 NMRA 2005 allows a witness to make prehearing motions and authorizes the Chairperson
4 of the Commission to rule upon any prehearing motions, including motions for protective
5 orders like the one sought by the witness in the District Court in this case. If a prehearing
6 motion involves the determination of factual issues, a majority of the Commissioners must
7 approve the decision in order for it to be valid, *see* Commission Rule 18 NMRA 2005, or
8 the Chairperson can appoint a judicial member of the Commission to preside. *See*
9 Commission Rule 22(A) NMRA 2005. That presiding member's decision "shall be taken
10 as consented to by the other members, unless one or more calls for a vote, in which latter
11 event such rulings shall be made by a majority of those present." *Id.*¹

12 (7) If a witness disagrees with a Commission decision and refuses to abide by a
13 subpoena, the Commission has two procedural options. One, our Rules Governing Review
14 of Judicial Standards Commission Proceedings allow the Commission to petition this Court
15 for an order requiring the noncompliant witness to show cause why he or she should not be
16 ordered to take the required action. *See* Rule 27-305 NMRA 2005. If the witness then
17 violates a Supreme Court order to take the action, the witness may be ordered to show cause
18 why he or she should not be held in contempt of Court. *Id.* Two, in severe cases of
19 misconduct or resistance to Commission proceedings, the Commission can also hold

20 ¹We note, parenthetically, that while the Chairperson is required to be an appointee by the
21 Governor and as such is always a layperson, *see* N.M. Const. art. VI, § 32, it has been the practice
22 of the Chairpersons to appoint judicial members of the Commission to decide prehearing motions
23 involving legal issues.


1 contempt hearings and find people in contempt of the Commission. *See* Commission Rule
2 4(E) NMRA 2005. After finding a person in contempt of the Commission, the Commission
3 “shall advise the Supreme Court of its findings, conclusions, and recommendations with
4 respect to the alleged contempt, and the Supreme Court may impose such penalties or
5 sanctions it deems appropriate.” *Id.* Thus, although we are not a fact-finding court, the
6 Constitution requires us to deal with evidentiary issues in these limited situations.²

7 (8) Another reason which compels us to reverse the District Court is the important
8 constitutional requirement that Commission proceedings be confidential. In accordance
9 with the independent, watchdog function of the Commission, the Constitution requires
10 Commission proceedings to be confidential until they reach this Court on review, *see* N.M.
11 Const. art. 6, § 32, and the Commission’s rules preserve and seek to effectuate this
12 confidentiality requirement. *See* Commission Rule 7(A) NMRA 2005 (“All papers and
13 pleadings filed with and proceedings before the commission or its masters shall be
14 confidential. Only when a record is filed by the Commission with the Supreme Court do the
15 proceedings lose their confidential character”). Although we are confident that our district
16 court judges could preserve the confidentiality of Commission proceedings, allowing a
17 district court to conduct an evidentiary hearing on the facts surrounding a request for a
18 confidential subpoena would interfere with the system our Constitution anticipates.

19 ²The Rules Governing Discipline of lawyers also require this Court to enforce or quash
20 subpoenas. If a witness fails to comply with a subpoena issued by the Disciplinary Board, the
21 disciplinary counsel may apply to the Supreme Court for an order directing the witness to take the
22 requisite action or be held in contempt of court. Rule 17-307 NMRA 2005. A witness may also
23 directly challenge a subpoena issued by the Disciplinary Board by applying to this Court for an order
24 to quash the subpoena. *Id.*

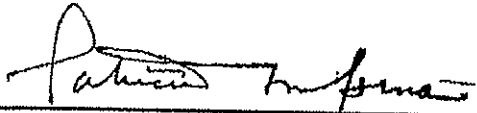
1 {9} We overturn the District Court order quashing the confidential subpoena and issue
2 a writ of prohibition to keep the District Court from acting outside of its authority and
3 conducting an evidentiary hearing in this matter. We remand further proceedings to the
4 Commission and direct the Commission to hear the witness's motion to quash the subpoena,
5 along with any other prehearing motions the witness wishes to make. We assume that the
6 Chairperson will adhere to what we understand is the standard practice and will appoint one
7 of the judicial members of the Commission to preside at the hearing on this motion pursuant
8 to Commission Rules 3(B)(1) and 22(A) NMRA 2005. Appointment of a judicial member
9 to consider the motion will allow a professional trained in the law to deal with the legal
10 issues concerning attorney work product and attorney-client privilege. If the Commission
11 upholds the subpoena and the witness still refuses to be deposed, the Commission may then
12 apply to this Court for an order to require the witness to show cause why the witness should
13 not be ordered to take the required action. *See* Rule 27-305 NMRA 2005.

14 {10} **IT IS SO ORDERED.**

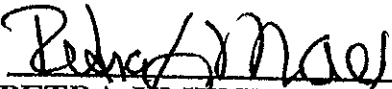
15
16 
EDWARD L. CHAVEZ, Justice

17 **WE CONCUR:**

18 
19 **RICHARD C. BOSSON, Chief Justice**

1 

2 **PATRICIO M. SERNA, Justice**

3 

4 **PETRA JIMENEZ MAES, Justice**

5 **PAMELA B. MINZNER, Justice (dissenting)**

1 **MINZNER, Justice (dissenting).**

2 {11} I respectfully dissent. The issue presented is whether the district court was authorized
3 to entertain an emergency motion to quash a subpoena issued by the court at the request of
4 the Judicial Standards Commission. A majority of this Court has concluded that the district
5 court lacked authority to schedule and hold a hearing, primarily because the rules the
6 Commission has adopted governing its proceedings do not authorize the district court either
7 to quash a subpoena requested by the Commission or to hold an evidentiary hearing on
8 whether to do so. Maj. Dec., ¶ 5. The majority also relies on the provision within the state
9 constitution that Commission proceedings are confidential. *Id.* ¶ 8. The majority construes
10 rules the Commission has adopted to provide an alternative forum. *Id.* ¶¶ 6, 7. The
11 arguments that have been made in support of the district court's authority to schedule and
12 hold a hearing, however, seem to me compelling. For the reasons that follow, I believe we
13 should deny the petition.

14 {12} As the majority notes, the Legislature has authorized the Commission to obtain a
15 subpoena from the district court. *See* NMSA 1978, § 34-10-2.1(B) (1977). The state
16 constitution recognizes the original jurisdiction of a district court, *see* N.M. Const. art. VI,
17 § 13, as well as "such jurisdiction of special cases and proceedings as may be conferred by
18 law." *Id.* The constitution recognizes the original jurisdiction of the district court in the
19 following terms: "original jurisdiction in all matters and causes not excepted in this
20 constitution." *Id.* I believe the district court had authority to schedule and hold the hearing

1 in question, because there is no relevant exception within the constitution. I also believe the
2 district court had authority to schedule and hold the hearing in question, because the
3 Legislature has authorized the Commission to obtain a subpoena from the district court. I
4 would infer, if necessary, the court's authority to quash a subpoena it had issued from its
5 power to issue the subpoena. As counsel for Respondent has noted, Rule 1-045 NMRA 2005
6 "expressly authorizes a district court to examine a claim of privilege in the context of
7 compelled disclosure pursuant to a subpoena." Finally, I am not persuaded the Commission
8 rules provide an alternative forum.

9 {13} In petitioning this Court for an extraordinary writ, the Commission has argued that its
10 independence is threatened by district court review of its subpoena pursuant to Rule 1-045.
11 The Commission asks this Court to conclude that "relevance, probative value or other
12 challenge[s]" to its subpoena "must be made through the Commission and reviewed by the
13 Supreme Court." Although its rules do not provide specifically for such a challenge, the
14 Commission has argued that the motion filed in district court should have been presented to
15 the Commission and that this Court might review continued resistance to the subpoena in the
16 context of an order to show cause why the party resisting the subpoena should not be held in
17 contempt.

18 {14} Alternatively, the Commission has argued that relief from any court should have been
19 deferred until the Commission had been asked to consider the challenges raised by the
20 emergency motion. The Commission reasons that the doctrine of exhaustion of

1 administrative remedies applies, and pursuant to that doctrine, the movant should have asked
2 the Commission for a stay. If denied, thereafter, the movant should have sought relief from
3 this Court pursuant to the rules governing judicial review of Judicial Standards Commission
4 Proceedings. See Rules 27-101 to 27-108 NMRA 2005.

5 {15} In summary, the Commission has asked that this Court conclude that “any challenges
6 to the Commission’s investigative authority must be heard within the Commission, with
7 ultimate review by the Supreme Court.” The Commission asks us to reach that conclusion
8 through a construction of the rules governing its proceedings and our rules governing review
9 of its proceedings. The majority reaches the conclusion the Commission has asked us to
10 reach, not only by construing those rules to provide an alternative forum, but also by adopting
1 a broad view of the Commission’s power to issue rules. Maj. Dec., ¶ 5.

12 {16} As the Real Party in Interest has noted, however, the Commission rule governing
13 prehearing motions appears to assume a hearing on formal charges has been scheduled.
14 Commission Rule 18 NMRA 2005. The subpoena issued in this case is part of a preliminary
15 investigation, in order to determine whether to hold a hearing. It is not clear that Rule 18
16 applies to these facts.

17 {17} In addition, Commission Rule 22 NMRA 2005 appears to govern evidence at a
18 hearing on formal charges, rather than an evidentiary hearing designed to resolve issues
19 involving privilege. Rule 18 does not seem to have been drafted to require the taking of
20 testimony at a pre-trial hearing. In reading Rules 18 and 22 together to permit the chair to

1 appoint a judicial member to hold such a hearing, the majority seems to be drafting a new
2 rule.

3 {18} Finally, as the Respondent has noted, the Commission's own rules provide that its
4 jurisdiction "is invoked when notice of formal proceedings is served upon the judge under
5 investigation." Commission Rule 38 NMRA 2005. Rule 38 seems consistent with the
6 provision in the state constitution that the Commission "shall promulgate regulations
7 establishing procedures for hearings under this section." N.M. Const. art. VI, § 32. The rules
8 on which the majority rely appear to be rules designed to govern Commission hearings on
9 formal charges and matters preliminary to those hearings, but following the filing of formal
10 charges.

11 {19} For these reasons, I have not been persuaded that the Commission has provided an
12 alternative forum for the issues the emergency motion raises, and thus, that the doctrine of
13 exhaustion of administrative remedies applies. I also am not persuaded that the Commission
14 has the power to rewrite its rules "to eliminate district courts from the subpoena process."
15 Maj. Dec., ¶ 5. I am not persuaded that power is consistent with the authority granted the
16 Commission by the state constitution to establish "procedures for hearings under this
17 section." N.M. Const. art. VI, § 32.

18 {20} Perhaps, in the end, the decision of the majority will be perceived as an exercise of this
19 Court's authority under the state constitution to issue writs "necessary or proper for the
20 complete exercise" of our jurisdiction or our authority to exercise "superintending control

1 over all inferior courts.” N.M. Const. art. VI, § 3. Perhaps, in resolving the issues raised by
2 the Commission, the Respondent, and the Real Party in Interest, we are helping draft rules
3 governing procedures of the Commission before formal charges are filed, much as we have
4 drafted or approved rules governing our review of proceedings following the disposition of
5 formal charges and as we have drafted or approved rules governing proceedings of the
6 Disciplinary Board. In that event, the process of drafting might have been improved had we
7 allowed the district court to entertain the emergency motion, resolve the issues presented, and
8 provide us a record of the evidentiary hearing. We then would have had an opportunity to
9 evaluate legal arguments in the context of a more specific ruling. The procedures that govern
10 extraordinary writs give the parties a very short time in which to frame and support their
11 arguments and give us an even narrower view of a problem than we have in the course of
12 more traditional appellate review. An extraordinary writ is a much less awkward procedure
13 when the relevant legal principles are clear and the facts are undisputed.

14 {21} In this proceeding, after briefing and oral argument, I am left with the sense that the
15 arguments in support of the district court’s authority to entertain the emergency motion are
16 compelling. The majority decision concedes that the district court could preserve
17 confidentiality in the course of entertaining the emergency motion. Maj. Dec., ¶ 8. Thus, I
18 think the premise on which the majority decision depends is that the Commission rules are
19 the sole source for resolution of the issues presented by the extraordinary writ. I believe that
20 this premise requires us to read more into the Commission rules than the words permit and

1 to read less within other relevant texts than we ought to do.

2 {22} I believe that under existing law, we should deny the petition. My colleagues being
3 of a different view, I respectfully dissent.

4

5

Pamela B. Minzner
PAMELA B. MINZNER, Justice